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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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# APPENDIX ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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# Supreme Court of Florida

No. 50,905

HENRY PERRY SIRECI, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 9, 1981]

ADKINS, J.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. We have jurisdiction.

The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins

that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

The defendant contends that the killing was a spur-of-the-moment act occurring after a fight had begun and that he entered the used car lot without any intent to rob or harm the victim. His only intent was to take keys from the office in order to return, after the office was closed, for a car. Defendant says this negates the element of premeditation.

Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the

act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA ) cert. denied, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958). Weighing the evidence in light of these standards it is clear that the premeditation of the defendant has been proved beyond a reasonable doubt.

The defendant stated to witness Perkins, in recounting the incident, that he hit the victim with the lug wrench, and demanded from the victim the location of the victim's money. The victim would not tell him, so the defendant stabbed him. The defendant told witness Perkins that he had looked all over for the money, but couldn't find any, so he took the man's wallet. The evidence shows that the defendant needed money, since he was not working and was preparing to go on a trip. The evidence was also sufficient to sustain a finding by the jury that defendant was guilty of felony murder. There was clearly sufficient, competent evidence by virtue of the circumstances, the physical evidence, and the defendant's own statements, to support the jury's verdict of guilty of murder in the first degree. Every reasonable hypothesis of innocence was excluded.

The defendant questions the admissibility of testimony from his former cellmate, Holtzinger, regarding an alleged attempt by the defendant to have his brother-in-law, Wilson, killed.[1] The defendant says this was an improper reference to a collateral offense. Wilson testified as to various statements made by the defendant which fully implicated him in the crime charged. He also testified that the defendant gave details about the knife and where the homicide took place. The defendant told Wilson where the knife was located and Wilson retrieved the knife

at that location and turned it over to the authorities. The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction. Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. denied, 362 U.S. 965 (1960). A defendant's attempt to intimidate a state witness is relevant and admissible. Vaccaro v. State, 152 Fla. 123, 11 So.2d 186 (Fla. 1942); Roberson v. State, 40 Fla. 509, 24 So. 474 (1898).

It is axiomatic that evidence of another crime is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, so that the evidence of such other crime would have a relevant or material bearing upon some essential aspect of the offense being tried. Ashley v. State, 265 So.2d 685 (Fla. 1972); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as the evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. Ashley v. State, supra.

The defendant contends that he was unduly prejudiced by the state's failure to include the name of Donald Holtzinger on a written witness list until the day of the trial. He argues that the trial court erred in refusing to strike Holtzinger's testimony. The defendant moved to continue the trial on the grounds that he had been given an additional list of five witnesses shortly before the trial and the state had failed to comply with the requirements of Florida Rule of Criminal Procedure 3.220. Compliance with this rule, i.e., furnishing a list of witnesses, does not necessarily have to be in writing.

The state was aware of the existence of this witness approximately four months prior to trial. Within two weeks after the state became aware of the witness, the detective who had the witness's name and the contents of his relevant information was deposed by the defendant's first attorney. The detective, at this deposition, informed the defendant's attorney of the witness Holtzinger, and that Holtzinger had been talking with the defendant about the incident in question. The initial witness list supplied to the defense concluded with the statement, "together with any other persons named in any investigative or laboratory reports or other documents furnished in compliance." Furthermore, Holtzinger's name was number 28 on the praecipe for witness subpoena, which was filed twelve days prior to trial. Additionally, defendant's counsel was made aware of the witness Holtzinger by prior defense counsel one week before trial. Finally, written notice was given to defense counsel two days before Holtzinger's testimony. A comprehensive inquiry, as contemplated by Richardson v. State, 246 So.2d 771 (Fla. 1971), was made by the trial court. It is axiomatic that a motion for continuance is addressed to the sound discretion of the trial judge. Raulerson v. State, 102 So.2d 281 (Fla. 1958). The defendant has failed to show that there was an abuse of the trial judge's discretion and has further failed to show that any prejudice resulted by the failure to include Holtzinger's name in an earlier written witness list.

In Mobley v. State, 327 So.2d 900 (Fla. 3d DCA), cert. denied, 341 So.2d 292 (1976), the court held that even though the state failed to provide the defendant with the name of a witness pursuant to a defense request for a typical discovery, the trial court did not abuse its discretion in denying defendant's motions to exclude the witness and in denying defendant's motion for continuance, where the defendant was given an opportunity to speak with the witness and where the name of the witness was listed in at least three places on defendant's arrest report. In Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), this Court held that the defendant had not been

unfairly surprised by the fact that a ballistics expert had been left off the list of witnesses, where defense counsel reasonably should have been aware of the state's proposed proof by reason of information already known to the defendant. See also Floyd v. State, 361 So.2d 802 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1366 (1979); Cooper v. State, 56 So.2d 911 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1364 (1979).

During the cross-examination of state witness Perkins the defense attempted to impeach her by use of the fact that during a deposition she had refused to answer questions on the advice of her attorney and pursuant to her attorney's objection on the grounds that she may be incriminated. Perkins admitted that this was the content of her deposition. Apparently defendant had information that public defender Bowen had worked out a deal in her behalf so that she would acquire immunity in exchange for her testimony. The defendant says that reversible error was committed because he was restricted in his cross examination of Perkins, so that he could not make inquiry as to the existence of an immunity contact.

However, the record discloses that defendant's counsel questioned her fully and in detail regarding any agreement which was made or promises which were received in return for her testimony. Perkins testified there was no agreement not to prosecute in exchange for her testimony. She was not charged with the commission of any offense in connection with the incident. She stated that she had not been led to believe, or assured, that she could not be prosecuted. On cross-examination she testified that she had not entered into any agreement with the prosecutor in connection with any offense in exchange for her testimony in the case. She knew of no deal worked out in her behalf by public defender Bowen in exchange for her testimony. The trial court clearly indicated defense counsel could attempt to impeach the witness's testimony regarding the fact that there had been no arrangement between her and the state for her testimony at the trial. However, no impeachment testimony was offered.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Mancebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1217 (1978). The defendant has failed to show any abuse of discretion on the part of the trial court.

Detective Nazurchuk testified concerning the interrogation of the defendant shortly after he was arrested. He stated that he read defendant his rights and that "he requested his attorney." The detective stated that the interview was then terminated. The defendant says he was denied due process of law by the introduction of this testimony which was a direct comment upon his exercise of his constitutional right to remain silent. The defendant made no objection to the admission of this testimony nor did he move for a mistrial. Under these circumstances he did not comply with the principles set forth in Clark v. State, 363 So.2d 331 (Fla. 1978), so he is not entitled to relief on appeal.

In considering the total record we cannot say that the statement by the detectives should be considered as fundamental error in view of its minimal impact. Doyle v. Ohio, 426 U.S. 610 (1976), clearly indicates that the harmless error doctrine could be applicable to this type of error. There was overwhelming evidence of defendant's guilt. In fact, the defendant had admitted his guilt to various witnesses produced by the state who were not law enforcement officers. We believe that the harmless error doctrine should be applied in a capital case where there is overwhelming evidence of defendant's guilt. There is no merit to this contention of the defendant.

Section 40.01(1), Florida Statutes (1977), provides that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request. The defendant's contention that this statute denies his right to a fair cross-section of the community on his jury is without merit. McArthur v. State, 351 So.2d 972 (Fla. 1977).

The defendant claims that he was denied due process of law by the state's failure to notify him prior to trial of the aggravating circumstances the state intended to prove in the case. This argument is without merit. Menendez v. State, 368 So.2d 1278 (Fla. 1979); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). Section 921.141(5), Florida Statutes (1977), defines the aggravating circumstances that may be considered by both the judge and the jury. This clearly rebuts the defendant's argument that he had no notice of the aggravating circumstances on which the state would rely.

The statutes in some other states specifically require that notice of the aggravating circumstances be given to the defendant prior to trial. The defendant's reliance upon cases from these jurisdictions is misplaced for it is irrelevant what other state statutes require in this regard. Even in the absence of such a provision, the Florida statute is constitutional and has been so held. Proffitt v. Florida, 428 U.S. 242 (1976); Menendez, supra; Spinkellink, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, sub nom. Hunter v. Florida, 416 U.S. 943 (1974).

The defendant argues that in order for the trial court to have the requisite jurisdiction to impose the death sentence, a listing of the aggravating circumstances which the state intends to rely upon must be contained in the indictment. This argument is also without merit. When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death, as provided in section 775.082 and 921.141, Florida Statutes, (1977). The indictment charged all the elements of murder in the first degree and the defendant had notice of the aggravating circumstances.

In support of his position defendant has cited Arthur v. State, 351 So.2d 60 (Fla. 4th DCA 1977), which seems to indicate that, before the trial court can impose a mandatory minimum three-year sentence pursuant to section 775.087(2), Florida Statutes (1977), the allegation that defendant carried a firearm

must be contained in the indictment. The mandatory minimum three-year sentence pursuant to the above statute is a separate sentence enhancement, which is not contained and for which notice is not provided in the particular statute with which a defendant is charged. Defendant in the case sub judice, being charged with murder in the first degree, is immediately placed on notice that he is charged with a capital felony punishable as provided by statute. Defendant also cites cases regarding the burglary and robbery statutes, arguing that the different degrees of burglary and robbery constitute the application of varying aggravating circumstances, analogous to the aggravating circumstances in a capitol felony. This argument is also without merit. Sections 810.02 and 812.13, Florida Statutes (1977), do not charge burglary and robbery with varying sentences depending upon the applicability of certain "aggravating circumstances." These statutes charge burglary and robbery in different degrees, each degree carrying different sentences. A defendant would not be on notice of which degree of burglary or robbery was charged unless the necessary allegations bringing the particular charge into a certain section of the burglary or robbery statute were contained in the information. See Growden v. State, 372 So.2d 930 (Fla. 1979).

Defendant contends that the death sentence was imposed upon defendant on the basis of aggravating circumstances that were not proved beyond a reasonable doubt and were improperly applied. He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Defendant argues that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain. He relies upon Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), where this Court said that pecuniary

gain cannot be doubled up with robbery in such a manner that two factors are considered as separate aggravating circumstances. In his findings of fact, the trial judge indicated that he was aware that in evaluating aggravating and mitigating circumstances he must not engage in a mere counting process of "x" number of aggravating circumstances and "x" number of mitigating circumstances, but rather a reasoned judgment. The mere recitation of these two factors does not condemn the death sentence. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Fleming v. State, 374 So.2d 954 (Fla. 1979).

As other aggravating factors, the Court found that defendant's intent in murdering the victim was for the purpose of avoiding arrest; that, at the time he committed the murder, the defendant had been previously convicted of a felony involving violence or threat of violence (robbery); and that the murder was especially heinous, atrocious, and cruel. The trial court found no mitigating circumstances. Even if the trial court improperly considered one or more aggravating factors, such is harmless in view of the fact that there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. Elledge v. State, 346 So.2d 998 (Fla. 1977).

Defendant counters with a contention that there were mitigating factors. He says that the trial court failed to give proper weight to evidence of the defendant's mental or emotional problems. It appears from the evidence that any psychological or emotional disorders of the defendant were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Defendant is attempting to argue the applicability of the psychological mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing has been presented which would have the effect of requiring this Court to disturb the findings of the judge. See Raulerson v. State, 358 So.2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978).

The defendant further argues that the state presented evidence to the jury of a non-statutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976), the fact that the defendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in Hargrave v. State, 366 So.2d 1 (Fla. 1978), the statements of the defendant that he had killed before and it would not bother him to kill again were considered as applicable to a consideration of whether or not the aggravating factor of "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case sub judice the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

Defendant contends that the Florida statute unconstitutionally limits the consideration of mitigating factors, relying upon Lockett v. Ohio, 438 U.S. 586 (1978). Lockett indicates that the sentencer cannot be precluded from considering, as mitigating factors, any aspect of defendant's character or record or any circumstances of the offense that the defendant may proffer as a basis for a sentence of less than death. However, the United States Supreme Court also clearly indicated that the trial court may exclude, as irrelevant, any evidence not bearing upon the defendant's character or record, or circumstances of the offense. Florida's death penalty statute comports with Lockett, supra, and has been so interpreted. Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Defendant, however, says that he was restricted in the presentation of evidence during the sentencing phase. The evidence which he attempted to introduce allegedly would have

pointed to his innocence. This argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of defendant's trial. A further repetition of evidence pointing to guilt or innocence in the case sub judice would have been repetitive and pointless in the sentencing phase. The trial judge clearly recognized his duty to consider evidence in mitigation when he said that "all evidence of mitigating circumstances may be considered by the judge or jury." He also recognized his duty to assess, by a process of reasoned judgment, what factual situtations required the imposition of death and which could be satisfied by life imprisonment in light of the totality of the circumstances present. The trial judge found no mitigating curcumstances to be present. This is not a situation where the judge refused to hear certain evidence of mitigating circumstances.

We have carefully reviewed the record and find no merit in the points raised by defendant for reversal of his conviction or reduction of his sentence.

Finding no reversible error, the judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

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[1] The incriminating statements made by defendant to his cellmates were not the result of any initiation of law enforcement. The cellmates came to the police after the statements were made. As a result, United States v. Henry, no. 799-121, 48 U.S.L.W. 4703 (June 18, 1980); Malone v. State, 390 So.2d 338 (Fla. 1980) are not applicable.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Orange County

Maurice M. Paul, Judge - Case No. 76-532

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Assistant Public Defender, and Richard B. Greene, Assistant Public Defender, West Palm Beach, Florida,

for Appellant

Jim Smith, Attorney General, and Robert L. Bogen, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

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| HENRY PERRY DIRECT, JR., | ) | |
| Appellant, | ) | |
| vs. | ) | CASE NO. 50,905 |
| STATE OF FLORIDA, | ) | |
| Appellee. | ) | |

MOTION FOR REHEARING

Appellant, HENRY PERRY DIRECT, JR., respectfully requests this Honorable Court to grant rehearing from its opinion filed April 9, 1981, and as grounds therefore, states:

1. This Court, in its opinion, seems to have created a rule that any evidence of prior offenses or bad acts is admissible if logically relevant. If this is indeed, now the law in Florida, it is in conflict with the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals and numerous Florida decisions. As the United States Supreme Court has stated in Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948):

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime ....
>
> The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. Id. at 476.

The Fifth Circuit Court of Appeals has laid out several safeguards for determining the admissibility of evidence of other crimes or bad acts in United States v. Tagliono, 546 F.2d 194 (5th Cir. 1977):

> The federal courts recognize as a cardinal principle of the common law that evidence of the commission of a wholly separate and independent crime is inadmissible as part of the case against the defendant. See Michelson v. United States, 335 U.S. 469, 475 76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The reason for this rule is, of course, that the guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense. However, the courts have carved out a number of exceptions to this rule; one of which is that evidence of other offenses is admissible to show criminal intent.
>
> Before an exception to the general rule may be invoked, the trial court must be satisfied that several pre-requisites have been met: (1) there is plain, clear and convincing evidence of a prior similar offense, (2) the prior offense is not too remote in time, (3) intent is a material issue in the instant case, and (4) there is substantial need for the probative value of the evidence. United States v. San Martin, 5 Cir. 1974, 505 F.2d 918, 921, 22. The danger of the prejudicial effect of similar offenses is such that all of these prerequisites must be met before being admitted into evidence. San Martin, 505 F.2d at 923. Id. at 199.

The Fifth Circuit Court of Appeals further delineated these principles in United States v. San Martin, 505 F.2d 918 (5th Cir. 1974).

> It is a cardinal principle of the common law that the prosecution may not use evidence of prior criminal acts in its case-in-chief to prove that the defendant committed the crime with which he is presently charged. See, Michelson v. United States, 335 U.S. 469, 475,476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)....
>
> We have repeatedly noted that the general rule is "just and wise" in order to avoid the enormous danger of prejudice to the defendant that the evidence of prior crimes creates

> and we have recently cautioned that "exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule." United States v. Miller, 500 F.2d 751, 762 (5th Cir. 1974). See also, e.g., United States v. Goodwin, 492 F.2d 1141, 1150 (5th Cir. 1974); United States v. Lawrence, 5th Cir., 480 F.2d 688, 691, 692, n.6; United States v. Broadway, 477 F.2d 991, 994-995 (5th Cir. 1973); United States v. Johnson, 453 F.2d 1195, 1199 (5th Cir. 1972); United States v. Boyd, 446 F.2d 1267, 1270-1271 (5th Cir. 1971). Id. at 921.

Thus, it is clear that the admission of prior crimes or bad acts is an exception to the general rule of exclusion, and is only to be allowed within stringent limits.

The Fifth Circuit applied these principles in United States v. Silva, 580 F.2d 144 (5th Cir. 1978). In Silva, supra the prosecution offered evidence of similar offenses that would be clearly relevant on the question of intent, which was an element of the crime charged. Id. at 147-148. The Court held that even though the evidence was clearly relevant to an element of the offense, it was inadmissible in Silva, supra; because the defense presented was one of mistaken identity, thus, there was no necessity to prove intent as it was not the primary issue contested. Id. at 148.

The Florida courts have also held that logical relevancy is not the only question the trial court must consider in determining the admissibility of evidence of other crimes or bad acts. This Court's opinion merely cited that Williams v. State, 110 So.2d 654 (Fla. 1959) and Ashley v. State, 265 So.2d 685 (Fla. 1972) for the principle that any logically relevant evidence is admissible. However, this Court has overlooked subsequent cases explaining the original holding of Williams, supra.

Subsequent decisions by this Court have further defined the scope of the Williams rule. In Williams v. State, 117 So.2d 473 (Fla. 1960) [hereinafter referred to as Williams II]this Court noted that evidence of a collateral

crime may be admissible, if limited, but that the evidence could become objectionable if it becomes a feature of the case. 117 So.2d at 475. Williams II recognized that the concepts of both "logical" and legal" relevancy must govern. Recent decisions have also recognized that the trial court must balance the probative value of the evidence against its prejudicial effect. E.g., Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977); Josey v. State, 336 So.2d 119 (Fla. 1st DCA 1976); Dodson v. State, 334 So.2d 305 (Fla. 1st DCA 1976); Colbert v. State, 320 So.2d 853 (Fla. 1st DCA 1975).

Thus, evidence which may be relevant to a material issue may still be inadmissible if its prejudicial effect outweighs its probative value. This is the concept of "legal" relevancy. Cf. Florida Evidence Code, §90.403. The court in Smith v. State, supra listed three factors to be weighed in determining whether or not the evidence should be admitted:

> "One factor is the issue of relevancy itself. To what extent is the objectionable evidence relevant....A second factor is the necessity of the testimony.[1] How important is the testimony of the state's case....A third factor might be termed 'quality of testimony'. Was the testimony directly related to the material issues of the case, or was it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him." Id. at 918.

The trial court has a duty to balance the prejudicial effect of the evidence against its probative value. Collateral offense evidence must meet a three part test for its admission and presentation to be proper: (1) It must be relevant to a material issue in the case; (2) its probative value must outweigh its prejudicial effect; and (3) It must not be presented in such a manner that it becomes a feature, rather than an incident of the trial.

The evidence in this case is extremely weak under

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[1] Appellant recognizes that this Court has rejected necessity as a precondition to admissibility in Ruffin v. State, ___ So.2d ___, Case Nos. 55,684 and 56,741. Opinion filed March 21, 1981, 1981 FLW 228 (Fla. 1981); however need is still a factor to be considered in determining admissibility.

all three factors laid out in Smith v. State, supra. This testimony was only marginally relevant to any issue in the case. These matters were allegedly admitted to show the "culpability and the guilt of the Defendant" (T 289-290). The main issue in this case was the degree of murder and the appropriate penalty. This was the basis of Appellant's closing argument and was the major contested issues in the first phase of this trial (T 702-712). Appellant's alleged attempt to kill a witness would have no relevance to the question of whether a defendant might attempt to eliminate a witness if guilty of any degree of murder. An attempt to eliminate a witness would not shed any light on this issue.

The second factor recognized in the Smith case was the necessity of the testimony to the state's case. Appellee produced other evidence to connect Appellant to the alleged homicide. The evidence of the alleged attempt to kill Wilson was unnecessary to Appellee's case and was designed to inflame the jury against Appellant.

In Smith v. State, supra the court pointed out that the appellant had conceded the killing and was relying on extenuating circumstances as his defense. 344 So.2d at 918. This is analogous to the present case where the real issues were the degree of murder and the appropriate penalty. The Court noted in Smith that the fact that the Appellant had conceded the killing had eliminated the need for "every shred of evidence and every word of testimony was of little necessity to Appellee's case.

The collateral offense evidence was also extremely weak under the third factor laid out in Smith v. State, supra; i.e. the "quality of the testimony". This testimony was only tangentially related to any of the material issues in the case. It was "more inclined to demonstrate the bad character of" appellant. Id. at 918.

The main effect of this testimony was not to shed light on any issue in the case. It was an attempt to show

that the defendant was a bad person with a propensity for violence. The admission of the evidence was an attempt to influence the jury to convict Appellant of first degree murder and sentence him to death because of his "bad character" rather than because the facts of the case showed this to be a first degree murder.

2. This Court has overlooked the fact that there are two collateral offenses admitted into evidence. This Court's opinion only discusses the admissibility of the alleged attempt to kill Mr. Wilson. The continual reference to another alleged homicide is clear, reversible error which this Court has ignored in its opinion.

Appellant was prejudiced by the use of testimony implying that Appellant was involved in another murder. David Wilson repeatedly implied during his testimony that Appellant was involved in some other murder. Wilson was asked why he had called the F.B.I. after he had spoken with Appellant. The following exchange took place:

> "A. To try and find out if there was some murder.
>
> Q. All right.
>
> A. Or murders. [Emphasis supplied] (T 495).

This was a deliberate attempt by the state's witness to imply that Appellant had been involved in some other murder. Mr. Wilson repeated this attempt later in his testimony. He was asked what the purpose was in altering the knife. He answered:

> "He wanted to be sure they were dead." (Emphasis supplied.) (T 514).

This was the third time in which Mr. Wilson had used the plural form and thereby continued to imply that Appellant was involved in another murder. Appellant moved for a mistrial on this ground and this motion was denied (T 536-538). This evidence had no probative value and was highly prejudicial.

3. This Court's opinion holds that Holtzinger's name was not placed on the written list until the day of trial; but that this is not reversible error because the trial judge

made "a comprehensive inquiry as contemplated by Richardson v. State, 246 So.2d 771 (Fla. 1971). However, the trial judge denied Appellant's motion for continuance without any inquiry whatsoever (Motion to Continue 13-14). This is clearly in violation of the holding of Richardson, supra. The trial judge's mid-trial denial of appellant's motion for mistrial was based on the alleged "lateness" of appellants' objection (Transcript 344). However, Appellant had raised this point in his pre-trial motion for continuance.

4. This Court's statement that a comment on post arrest silence can be harmless error is dicta, as this Court also held that this issue was not properly preserved under Clark v. State, 363 So.2d 331 (Fla. 1978). However, these comments in dicta cannot be overlooked as they directly conflict with existing Florida law. This Court has held in Clark v. State, 363 So.2d 331 (Fla. 1978); Bennee v. State; and Shannon v. State, 335 So.2d 5 (Fla. 1976) that the admission of a comment on post arrest silence is always reversible error; if properly preserved.

6. This Court reaffirmed the constitutionality of Section 40.01 (1) Florida Statutes (1977) (providing that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request); merely citing McArthur v. State, 351 So.2d 972 (Fla. 1977).

McArthur, supra was decided before the landmark case of Duren v. Missouri, 439 U.S. 357 (1979). In Duren, supra the United States Supreme Court clearly held that a sexually based exemption, on request, is unconstitutional, if not rationally based, as denying a defendant the rights to a fair cross-section of the community. In Duren, the Court held unconstitutional a Missouri law which allowed all women to exclude themselves, on request, when men could only claim such a privilege if over 65.

In Florida any expectant mother or mother of a child under 15 years of age may be exempted from jury duty upon

request. §40.01 (1), Fla.Stat. (1977). While the United States Supreme Court has recognized that the State has an appropriate interest in assuring that family members are able to perform child care duties, the means of achieving this must not deny a defendant his right to a fair cross-section of the community. 439 U.S. at 670.

The exemption at issue is both under-inclusive and over-inclusive and thus unnecessarily deprives defendants of their right to a fair cross-section of the community. The statute is underinclusive because it only exempts the mothers of young children. The fathers of small children, who have child care responsibilities, have no similar exemption. This is a sex-based exclusion which has no rational relation to any state interest. If the State is going to assert its interest in responsible child-care, it must assert it equally in favor of women and men who have child care responsibilities since such sex-descrimination is forbidden by our Constitution.

This exemption is also over-inclusive because it allows all women with young children to exempt themselves whether they have child-care responsibilities or not. Many women with children under 15 have no child-care responsibilities. Their children may be in school, in day-care centers or may be taken care of by relatives. Yet, these women may excuse themselves without any showing of a need to perform child-care duties. Thus, this exemption is also over-inclusive and unnecessarily excludes women from the jury pool; thus unnecessarily denying Appellant a fair cross-section of the community in violation fo the Sixth and Fourteenth Amendments.

Therefore, the Florida jury statute is unconstitutional on its face as denying the right to a fair cross-section of the community under the Sixth and Fourteenth Amendments.

7. This Court concedes in its own opinion that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, but holds that this error does not require resentencing. This is clearly violative of the

constitutional requirements laid out by the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In Stephens, supra the trial court had found three aggravating circumstances and the Fifth Circuit Court of Appeal found one of them to be invalid. Id. at 405-406. The Court remanded for resentencing, stating:

> The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.
>
> In Stromberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).
>
> It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. Id. at 406.

The Court took this position without regard to the presence or absence of mitigating circumstances. Indeed, there is

nothing in the record to suggest the presence of mitigating circumstances.

8. This Court also held that Appellant suffered from psychological problems; specifically personality disorders. This Court also recognized the fact that Appellant had severe family problems after he discovered that his father was not his real father. However, this Court holds that these factors do not need to be considered in mitigation. This is directly contrary to the mandate of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978). The Court in Lockett stated:

> "We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death... a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. 604-605 (plurality opinion) [Emphasis supplied].

Thus, it is clear that it is reversible error to not give independent mitigating to any factor relating to the defendant's character or record, or the circumstances of the offense. Here, neither judge, jury, nor this Court considered these factors in mitigation. This clearly requires resentencing; especially when considered in light of the clear erroneous aggravating circumstance and the questionable nature of the other aggravating factors.

9. This Court held that evidence of "lack of remorse" is admissible to show that the offense is "heinous, atrocious or cruel". This is contrary to prior decisions of this Court and the United States Supreme Court. The application of this crime is limited to those homicides which are "accompanied by such additional acts as to set the crime apart from the normal

capital felonies" [Emphasis Supplied]. State v. Dixon, supra 283 So.2d 1, 9. The key to whether this factor applies is whether the victim was tortured in any way and not the defendant's attitude after the crime. This Court has specifically rejected actions long after the crime as irrelevant to this issue. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). In Kampff v. State, 371 So.2d 1007, the trial judge had relied on the fact that the defendant had shown no remorse and had said "good" when told his victim was dead in his finding that the homicide was "heinous, atrocious, or cruel." 371 So.2d at 1009-1010. This Court rejected the trial judge's finding, holding this evidence to be irrelevant. Id. at 1010.

In Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 the United States Supreme Court rejected a finding that the homicid was "outrageously or wantonly vile, horrible or inhuman" (the Georgia equivalent of Florida's heinous, atrocious or cruel) even though after the killing the defendant had said "I've done a hideous crime, ... but I have been thinking about it for eight years... I'd do it again." 100 S.Ct. at 1763. The Court held that the application of this aggravating circumstance is dependent or torture of the victim. Thus, any post-death actions or attitudes are irrelevant under Florida law and Federal law.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant a rehearing, and vacate its prior opinion in the above-styled case.

Respectfully submitted,

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BY _____
RICHARD B. GREENE
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 10, 1981

| | | |
|---|---|---|
| HENRY PERRY SIRECI, | ** | |
| Appellant, | ** | CASE NO. 50,905 |
| vs. | ** | |
| STATE OF FLORIDA, | ** | Circuit Court Case No. 76-532 (Orange) |
| Appellee. | ** | |

The motion for rehearing is denied except as to Ground #4 which requests this Court to delete its statement that a comment on post arrest silence can be harmless error. The opinion filed April 9, 1981, is hereby revised by deleting the third complete paragraph on page 7.

The application for stay of judgment and for stay of execution is granted and proceedings in this Court and in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, are hereby stayed to and including July 10, 1981, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

C
cc: Hon. Randall Kirkland, Clerk
Hon. Maurice M. Paul, Judge

Richard B. Greene, Esquire
Robert L. Bogen, Esquire

death sentences and would remand for resentencing by the trial judge only.

Henry Perry SIRECI, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 50905.

Supreme Court of Florida.

April 9, 1981.

As Corrected on Denial of Rehearing June 10, 1981.

Defendant was convicted before the Circuit Court, Orange County, Maurice M. Paul, J., of first-degree murder and was sentenced to death, and he took direct appeal. The Supreme Court, Adkins, J., held that: (1) evidence proved premeditation beyond reasonable doubt; (2) defendant's former cell mate's testimony in regard to defendant's statements relating to attempt to have his brother-in-law killed for purpose of preventing him from testifying was admissible; (3) refusal to strike a state witness' testimony for alleged failure to include his name on written witness list until day of trial was not abuse of discretion; (4) failure to notify defendant prior to trial of the aggravating circumstances which state intended to prove did not deny defendant due process; (5) even if trial court improperly considered one or more aggravating factors, such impropriety would have been harmless; (6) defendant was not entitled to relief on theory that trial court failed to give proper weight to evidence of defendant's mental or emotional problems; (7) it was not shown that trial court considered "lack of remorse" as a separate aggravating factor; and (8) refusal, during sentencing phase, to permit defendant to present evidence allegedly pointing to his innocence was not error.

Judgment and sentence affirmed.

1. Homicide ⇐232

Premeditation can be shown by circumstantial evidence.

2. Homicide ⇐14(1)

"Premeditation" is a fully formed purpose to kill, which exists in mind of perpetrator for sufficient length of time to permit a reflection, and in pursuance of which an act of killing ensues.

See publication Words and Phrases for other judicial constructions and definitions.

3. Homicide ⇐14(2)

Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act.

4. Homicide ⇐232

Evidence from which premeditation may be inferred includes such matters as nature of the weapon used, presence or absence of adequate provocation, previous difficulties between the parties, or the manner in which the homicide was committed and nature of the wounds inflicted.

5. Homicide ⇐14(2)

Premeditation must exist for such time before the homicide as will enable accused to be conscious of nature of deed he is about to commit and probable result to flow from it, insofar as life of victim is concerned.

6. Homicide ⇐253(3)

In proceeding in which defendant was convicted of first-degree murder, evidence, including evidence that defendant needed money and that he stated that he hit victim with wrench and demanded that victim disclose location of his money and that defendant stabbed victim because he would not tell defendant where the money was proved premeditation beyond reasonable doubt.

7. Homicide ⇐253(6)

In proceeding in which defendant was convicted of first-degree murder, evidence was sufficient to sustain a finding that defendant was guilty of felony-murder.

8. Criminal Law ⇐351(10)

In proceeding in which defendant was convicted of first-degree murder, defendant's former cell mate's testimony in regard to defendant's statements relating to his alleged attempt to have his brother-in-law killed so as to prevent him from testifying was admissible.

9. Criminal Law ⇐351(1)

Evidence that a suspected person has in any manner endeavored to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against accused where relevance of such evidence is based on consciousness of guilt inferred from such actions.

10. Criminal Law ⇐351(10)

Defendant's attempt to intimidate a state witness is relevant and admissible.

11. Criminal Law ⇐369.15, 371(1, 12), 372(1)

Evidence of another crime is admissible if it casts light on character of act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality, so that evidence of such other crime would have a relevant or material bearing on some essential aspect of the offense being tried.

12. Criminal Law ⇐369.2(1)

Test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible.

13. Criminal Law ⇐629

Compliance with rule requiring furnishing of a list of witnesses does not necessarily have to be in writing. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

14. Criminal Law ⇐629

In murder prosecution, refusal to strike state witness' testimony for alleged failure to include his name on written witness list until day of trial was not abuse of discretion, in light of fact that detective, at a deposition, had informed defendant's attorney of the witness and that he had been talking with defendant, that initial witness list concluded with statement "together with any other persons named in * * * reports or other documents furnished in compliance," that witness' name was on praecipe for witness subpoena filed 12 days prior to trial, that defense counsel was made aware of witness one week before trial and that written notice was given two days before witness' testimony. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

15. Witnesses ⇐267

Defendant, who was convicted of first-degree murder, failed to show any abuse of discretion in regard to alleged restriction of his cross-examination of state witness.

16. Constitutional Law ⇐266.1(1)

Defendant, who was convicted of first-degree murder, was not entitled to relief on appeal on basis of contention that he was denied due process by introduction of testimony, in which detective stated that he read defendant his rights and that "he requested his attorney" and which was assertedly a direct comment on his exercise of his constitutional right to remain silent, in light of fact that defendant had made incriminating statements to many people including a confession to his brother-in-law. U.S.C.A. Const. Amends. 5, 14.

17. Jury ⇐33(1)

Statute, which provides that any expectant mother or mother with child under 15 years of age may be exempted from jury duty on request, does not deny an accused his right to a fair cross section of the community on his jury. West's F.S.A. § 40.-01(1).

18. Constitutional Law ⇐270(1)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, State's failure to notify defendant prior to trial of the aggravating circumstances the State intended to prove did not deny defendant due process. West's F.S.A. § 921.141(5); U.S.C.A.Const. Amend. 14.

**19. Indictment and Information ⇐113**

Indictment need not contain list of aggravating circumstances, which state intends to rely on, in order for trial court to have jurisdiction to impose death sentence. West's F.S.A. §§ 775.082, 775.087(2), 921.141.

**20. Criminal Law ⇐1159.2(5)**

Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings.

**21. Homicide ⇐354**

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on theory that trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, in light of fact, that though judge recited such two factors, he indicated that he was aware that in evaluating aggravating and mitigating circumstances he was not to engage in a mere counting process of "x" number of aggravating circumstances, and "x" number of mitigating circumstances, but, rather, was to make a reasoned judgment. West's F.S.A. §§ 775.082, 921.141.

**22. Homicide ⇐343**

Even if trial court improperly considered one or more aggravating factors in proceeding in which defendant was convicted of first-degree murder and was sentenced to death, such impropriety would have been harmless, in view of fact that there were no mitigating factors and that at least one or more statutorily listed aggravating factors were present. West's F.S.A. §§ 775.082, 921.141.

**23. Homicide ⇐354**

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on basis of contention that trial court failed to give proper weight to evidence of defendant's mental or emotional problems, though he may have had personality disorders relating to fact that he discovered that person believed to be defendant's father was not his real father. West's F.S.A. §§ 775.082, 921.141.

**24. Homicide ⇐354**

Though lack of remorse cannot constitute an aggravating circumstance in determining whether death sentence should be imposed, it can be offered to jury and judge as a factor which goes into the equation of whether or not crime was specially heinous, atrocious or cruel. West's F.S.A. §§ 775.082, 921.141.

**25. Homicide ⇐327**

On appeal from judgment adjudging defendant guilty of first-degree murder and sentencing him to death, it was not shown that trial court had considered "lack of remorse" as a separate aggravating factor. West's F.S.A. §§ 775.082, 921.141.

**26. Criminal Law ⇐1206(1)**

Death penalty statute does not unconstitutionally limit consideration of mitigating factors. West's F.S.A. § 921.141.

**27. Homicide ⇐354**

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal, during sentencing phase, to permit defendant to present evidence allegedly pointing to his innocence was not error. West's F.S.A. §§ 775.082, 921.141.

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Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender, and Richard B. Greene, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. We have jurisdiction.

The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the

rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

The defendant contends that the killing was a spur-of-the-moment act occurring after a fight had begun and that he entered the used car lot without any intent to rob or harm the victim. His only intent was to take keys from the office in order to return, after the office was closed, for a car. Defendant says this negates the element of premeditation.

[1-6] Premeditation can be shown by circumstantial evidence. *Spinkellink v. State*, 313 So.2d 666 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. *Weaver v. State*, 220 So.2d 53 (Fla. 2d DCA), *cert. denied*, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. *Hernandez v. State*, 273 So.2d 130 (Fla. 1st DCA) *cert. denied*, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. *Larry v. State*, 104 So.2d 352 (Fla.1958). Weighing the evidence in light of these standards it is clear that the premeditation of the defendant has been proved beyond a reasonable doubt.

[7] The defendant stated to witness Perkins, in recounting the incident, that he hit the victim with the lug wrench, and demanded from the victim the location of the victim's money. The victim would not tell him, so the defendant stabbed him.

The defendant told witness Perkins that he had looked all over for the money, but couldn't find any, so he took the man's wallet. The evidence shows that the defendant needed money, since he was not working and was preparing to go on a trip. The evidence was also sufficient to sustain a finding by the jury that defendant was guilty of felony murder. There was clearly sufficient, competent evidence by virtue of the circumstances, the physical evidence, and the defendant's own statements, to support the jury's verdict of guilty of murder in the first degree. Every reasonable hypothesis of innocence was excluded.

[8–10] The defendant questions the admissibility of testimony from his former cellmate, Holtzinger, regarding an alleged attempt by the defendant to have his brother-in-law, Wilson, killed.[1] The defendant says this was an improper reference to a collateral offense. Wilson testified as to various statements made by the defendant which fully implicated him in the crime charged. He also testified that the defendant gave details about the knife and where the homicide took place. The defendant told Wilson where the knife was located and Wilson retrieved the knife at that location and turned it over to the authorities. The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction. Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any *ex post facto* indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions. *Mackiewicz v. State*, 114 So.2d 684 (Fla.1959), *cert. denied*, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960). A defendant's attempt to intimidate a state witness is relevant and admissible. *Vaccaro v. State*, 152 Fla. 123, 11 So.2d 186 (Fla. 1942); *Roberson v. State*, 40 Fla. 509, 24 So. 474 (1898).

[11, 12] It is axiomatic that evidence of another crime is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, so that the evidence of such other crime would have a relevant or material bearing upon some essential aspect of the offense being tried. *Ashley v. State*, 265 So.2d 685 (Fla.1972); *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 103, 4 L.Ed.2d 86 (1959). The test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as the evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. *Ashley v. State*, *supra*.

[13] The defendant contends that he was unduly prejudiced by the state's failure to include the name of Donald Holtzinger on a written witness list until the day of the trial. He argues that the trial court erred in refusing to strike Holtzinger's testimony. The defendant moved to continue the trial on the grounds that he had been given an additional list of five witnesses shortly before the trial and the state had failed to comply with the requirements of Florida Rule of Criminal Procedure 3.220. Compliance with this rule, *i. e.*, furnishing a list of witnesses, does not necessarily have to be in writing.

[14] The state was aware of the existence of this witness approximately four months prior to trial. Within two weeks after the state became aware of the witness, the detective who had the witness's name and the contents of his relevant information was deposed by the defendant's first attorney. The detective, at this deposition, informed the defendant's attorney of the witness Holtzinger, and that Holtzinger had been talking with the defendant about the

1. The incriminating statements made by defendant to his cellmates were not the result of any initiation of law enforcement. The cellmates came to the police after the statements were made. As a result, *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Malone v. State*, 390 So.2d 338 (Fla. 1980) are not applicable.

incident in question. The initial witness list supplied to the defense concluded with the statement, "together with any other persons named in any investigative or laboratory reports or other documents furnished in compliance." Furthermore, Holtzinger's name was number 28 on the praecipe for witness subpoena, which was filed twelve days prior to trial. Additionally, defendant's counsel was made aware of the witness Holtzinger by prior defense counsel one week before trial. Finally, written notice was given to defense counsel two days before Holtzinger's testimony. A comprehensive inquiry, as contemplated by *Richardson v. State*, 246 So.2d 771 (Fla.1971), was made by the trial court. It is axiomatic that a motion for continuance is addressed to the sound discretion of the trial judge. *Raulerson v. State*, 102 So.2d 281 (Fla.1958). The defendant has failed to show that there was an abuse of the trial judge's discretion and has further failed to show that any prejudice resulted by the failure to include Holtzinger's name in an earlier written witness list.

In *Mobley v. State*, 327 So.2d 900 (Fla. 3d DCA), *cert. denied*, 341 So.2d 292 (Fla.1976), the court held that even though the state failed to provide the defendant with the name of a witness pursuant to a defense request for a typical discovery, the trial court did not abuse its discretion in denying defendant's motions to exclude the witness and in denying defendant's motion for continuance, where the defendant was given an opportunity to speak with the witness and where the name of the witness was listed in at least three places on defendant's arrest report. In *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), this Court held that the defendant had not been unfairly surprised by the fact that a ballistics expert had been left off the list of witnesses, where defense counsel reasonably should have been aware of the state's proposed proof by reason of information already known to the defendant. *See also Floyd v. State*, 361 So.2d 802 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1366 (Fla.1979); *Cooper v. State*, 356 So.2d 911 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1364 (Fla. 1979).

[15] During the cross-examination of state witness Perkins the defense attempted to impeach her by use of the fact that during a deposition she had refused to answer questions on the advice of her attorney and pursuant to her attorney's objection on the grounds that she may be incriminated. Perkins admitted that this was the content of her deposition. Apparently defendant had information that public defender Bowen had worked out a deal in her behalf so that she would acquire immunity in exchange for her testimony. The defendant says that reversible error was committed because he was restricted in his cross examination of Perkins, so that he could not make inquiry as to the existence of an immunity contract.

However, the record discloses that defendant's counsel questioned her fully and in detail regarding any agreement which was made or promises which were received in return for her testimony. Perkins testified there was no agreement not to prosecute in exchange for her testimony. She was not charged with the commission of any offense in connection with the incident. She stated that she had not been led to believe, or assured, that she could not be prosecuted. On cross-examination she testified that she had not entered into any agreement with the prosecutor in connection with any offense in exchange for her testimony in the case. She knew of no deal worked out in her behalf by public defender Bowen in exchange for her testimony. The trial court clearly indicated defense counsel could attempt to impeach the witness's testimony regarding the fact that there had been no arrangement between her and the state for her testimony at the trial. However, no impeachment testimony was offered.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse

of discretion. *Mancebo v. State*, 350 So.2d 1098 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1217 (Fla.1978). The defendant has failed to show any abuse of discretion on the part of the trial court.

[16] Detective Nazurchuk testified concerning the interrogation of the defendant shortly after he was arrested. He stated that he read defendant his rights and that "he requested his attorney." The detective stated that the interview was then terminated. The defendant says he was denied due process of law by the introduction of this testimony which was a direct comment upon his exercise of his constitutional right to remain silent. The defendant made incriminating statements to many people, including a confession to his brother-in-law.

[17] Section 40.01(1), Florida Statutes (1977), provides that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request. The defendant's contention that this statute denies his right to a fair cross-section of the community on his jury is without merit. *McArthur v. State*, 351 So.2d 972 (Fla.1977).

[18] The defendant claims that he was denied due process of law by the state's failure to notify him prior to trial of the aggravating circumstances the state intended to prove in the case. This argument is without merit. *Menendez v. State*, 368 So.2d 1278 (Fla.1979); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). Section 921.141(5), Florida Statutes (1977), defines the aggravating circumstances that may be considered by both the judge and the jury. This clearly rebuts the defendant's argument that he had no notice of the aggravating circumstances on which the state would rely.

The statutes in some other states specifically require that notice of the aggravating circumstances be given to the defendant prior to trial. The defendant's reliance upon cases from these jurisdictions is misplaced for it is irrelevant what other state statutes require in this regard. Even in the absence of such a provision, the Florida statute is constitutional and has been so held. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Menendez, supra; Spinkellink, supra; State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied, sub nom. Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

[19] The defendant argues that in order for the trial court to have the requisite jurisdiction to impose the death sentence, a listing of the aggravating circumstances which the state intends to rely upon must be contained in the indictment. This argument is also without merit. When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death, as provided in section 775.082 and 921.141, Florida Statutes (1977). The indictment charged all the elements of murder in the first degree and the defendant had notice of the aggravating circumstances.

In support of his position defendant has cited *Arthur v. State*, 351 So.2d 60 (Fla. 4th DCA 1977), which seems to indicate that, before the trial court can impose a mandatory minimum three-year sentence pursuant to section 775.087(2), Florida Statutes (1977), the allegation that defendant carried a fireman must be contained in the indictment. The mandatory minimum three-year sentence pursuant to the above statute is a separate sentence enhancement, which is not contained and for which notice is not provided in the particular statute with which a defendant is charged. Defendant in the case *sub judice*, being charged with murder in the first degree, is immediately placed on notice that he is charged with a capital felony punishable as provided by statute. Defendant also cites cases regarding the burglary and robbery statutes, arguing that the different degrees of burglary and robbery constitute the application of varying aggravating circumstances, analogous to the aggravating circumstances in a capital felony. This argument is also without merit. Sections 810.02 and 812.13, Flor-

ida Statutes (1977), do not charge burglary and robbery with varying sentences depending upon the applicability of certain "aggravating circumstances." These statutes charge burglary and robbery in different degrees, each degree carrying different sentences. A defendant would not be on notice of which degree of burglary or robbery was charged unless the necessary allegations bringing the particular charge into a certain section of the burglary or robbery statute were contained in the information. *See Growden v. State*, 372 So.2d 930 (Fla.1979).

[20] Defendant contends that the death sentence was imposed upon defendant on the basis of aggravating circumstances that were not proved beyond a reasonable doubt and were improperly applied. He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Lucas v. State*, 376 So.2d 1149 (Fla.1979).

[21] Defendant argues that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain. He relies upon *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), where this Court said that pecuniary gain cannot be doubled up with robbery in such a manner that two factors are considered as separate aggravating circumstances. In his findings of fact, the trial judge indicated that he was aware that in evaluating aggravating and mitigating circumstances he must not engage in a mere counting process of "x" number of aggravating circumstances and "x" number of mitigating circumstances, but rather a reasoned judgment. The mere recitation of these two factors does not condemn the death sentence. *Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Fleming v. State*, 374 So.2d 954 (Fla.1979).

[22] As other aggravating factors, the Court found that defendant's intent in murdering the victim was for the purpose of avoiding arrest; that, at the time he committed the murder, the defendant had been previously convicted of a felony involving violence or threat of violence (robbery); and that the murder was especially heinous, atrocious, and cruel. The trial court found no mitigating circumstances. Even if the trial court improperly considered one or more aggravating factors, such is harmless in view of the fact that there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. *Elledge v. State*, 346 So.2d 998 (Fla.1977).

[23] Defendant counters with a contention that there were mitigating factors. He says that the trial court failed to give proper weight to evidence of the defendant's mental or emotional problems. It appears from the evidence that any psychological or emotional disorders of the defendant were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Defendant is attempting to argue the applicability of the psychological mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing has been presented which would have the effect of requiring this Court to disturb the findings of the judge. *See Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978).

[24, 25] The defendant further argues that the state presented evidence to the jury of a non-statutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), the fact that the de-

fendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in *Hargrave v. State*, 366 So.2d 1 (Fla.1978), the statements of the defendant that he had killed before and it would not bother him to kill again were considered as applicable to a consideration of whether or not the aggravating factor of "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case *sub judice* the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

[26, 27] Defendant contends that the Florida statute unconstitutionally limits the consideration of mitigating factors, relying upon *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* indicates that the sentencer cannot be precluded from considering, as mitigating factors, any aspect of defendant's character or record or any circumstances of the offense that the defendant may proffer as a basis for a sentence of less than death. However, the United States Supreme Court also clearly indicated that the trial court may exclude, as irrelevant, any evidence not bearing upon the defendant's character or record, or circumstances of the offense. Florida's death penalty statute comports with *Lockett, supra*, and has been so interpreted. *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Defendant, however, says that he was restricted in the presentation of evidence during the sentencing phase. The evidence which he attempted to introduce allegedly would have pointed to his innocence. This argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of defendant's trial. A further repetition of evidence pointing to guilt or innocence in the case *sub judice* would have been repetitive and pointless in the sentencing phase. The trial judge clearly recognized his duty to consider evidence in mitigation when he said that "all evidence of mitigating circumstances may be considered by the judge or jury." He also recognized his duty to assess, by a process of reasoned judgment, what factual situations required the imposition of death and which could be satisfied by life imprisonment in light of the totality of the circumstances present. The trial judge found no mitigating circumstances to be present. This is not a situation where the judge refused to hear certain evidence of mitigating circumstances.

We have carefully reviewed the record and find no merit in the points raised by defendant for reversal of his conviction or reduction of his sentence.

Finding no reversible error, the judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

**STATE of Florida, Appellant,**

**v.**

**James Ronald CONSTANTINI, Paul Earnest Kersten, Samuel R. Mathes, and William Lloyd Tobin, Appellees.**

**No. 58112.**

Supreme Court of Florida.

April 30, 1981.

Rehearing Denied July 9, 1981.

Appeal from Circuit Court, Okeechobee County; L. B. Vocelle, Judge.

Jim Smith, Atty. Gen., and Stewart J. Bellus, Asst. Atty. Gen., West Palm Beach, for appellant.

Anthony T. Young, Asst. State Atty., Okeechobee, Steve Kackley, Sebring, Michael Bloom, Miami, and H. Stephen Rash of Rash, Katzen, Kay & Pintado, South Miami, for appellees.

# 81-5379

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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
SEP 8 1981
Alexander L. Stevas, Clerk

HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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MOTION TO LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, HENRY PERRY SIRECI, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of Florida without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

CRAIG S. BARNARD
Chief Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

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October Term, 1980

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HENRY PERRY SIRECI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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AFFIDAVIT

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I, HENRY PERRY SIRECI, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my property I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Orange County, Florida. I appealed the judgment of conviction and the sentence of death to the Florida Supreme Court; that court affirmed both the judgment and sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

Henry Sireci
HENRY PERRY SIRECI

Duly witnessed and sworn to before me this
13 day of July, 1981.

M B Kennett
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 1, 1982